

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

THOMASINE R. CLOUDE,
AND INA R. HUNTER,
Appellants,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBERS
DC-0752-98-0584-I-1
DC-0752-98-0585-I-1

DATE: August 3, 1999

Stephen G. De Nigris, Esquire, Washington, D.C., for the appellants.

Judy A. Mitchell, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellants have petitioned for review of the August 27, 1998 initial decision that affirmed the agency's removal actions. For the reasons set forth below, we find that the appellants' petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN these appeals on our own motion under 5 C.F.R. § 1201.118, however, and REMAND them to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellants were GS-06 Police Officers at the Washington Navy Yard. Cloude Initial Appeal File (CIAF), Tab 1; Hunter Initial Appeal File (HIAF), Tab 1. They were reinstated to these positions pursuant to a December 23, 1997 decision of the Board reversing earlier agency removals. *See Hunter v. Department of the Navy*, MSPB Docket No. DC-0752-97-0952-I-1 (Initial Decision, Dec. 23, 1997). The agency had charged the appellants with failure to meet a condition of employment because they failed to requalify on the Navy Handgun Qualification Course (NHQC). *Id.* The administrative judge reversed the removal actions because the agency had failed to provide the appellants with quarterly familiarization and remedial training as required by its own regulations.* *Id.* The Board's decision became final, and the appellants were reinstated to their positions on February 17, 1998. *Id.*

¶3 The appellants' position descriptions require them to "[q]ualify with issued 9mm and shot gun within thirty days after appointment and maintain this qualification thereafter." CIAF, Tab 5, Subtab 4o; HIAF, Tab 5, Subtab 4o. The parties stipulated that the appellants received instructions on February 17, 18, 19, and 20, 1998, concerning policies, procedures, and regulations governing the carrying, use, and safety practices relating to firearms. CIAF, Tab 10. The parties also stipulated that the appellants failed to achieve the minimum qualifying score of 180 during their attempts to requalify on the 9mm on the NHQC on February 18, 19, and 20, 1998. *Id.* Because the appellants failed to requalify on the 9mm, the agency again charged them with failing to meet a

* OPNAVINST 5580.1 (change 2) and Security Directive 23-90 which was canceled by Security Directive 19-94, dated December 23, 1994, which was subsequently revised by Security Directive 19-94 CH-1, dated February 12, 1998. CIAF, Tab 5, Subtab 4r; HIAF, Tab 5, Subtab 4q.

condition of their employment and removed them from service. CIAF, Tab 5, Subtab 4b; HIAF, Tab 5, Subtab 4b.

¶4 The appellants timely appealed their removals. CIAF, Tab 1; HIAF, Tab 1. After entering into the above-mentioned stipulations, the appellants withdrew their requests for a hearing, CIAF, Tabs 10 & 11; therefore, the administrative judge decided the appeals on the written record. The administrative judge affirmed the agency's actions. CIAF, Tab 13; HIAF, Tab 7. The appellants timely petitioned for review. Petition for Review File, Tab 1. The agency did not respond.

ANALYSIS

¶5 We find that the appellants' petition for review does not meet the criteria for review which are set forth at 5 C.F.R. § 1201.115(d) because it does not contain new and material evidence nor does it contain persuasive argument that the administrative judge's decision was based on an erroneous interpretation of statute or regulation. We reopen these appeals, however, because we find that there is a question as to whether the agency complied with the Board's final order which reversed the appellants' first removals.

¶6 In reversing the appellants' first removals, the Board found that the agency had failed to follow its own regulations which required it to provide quarterly familiarization and remedial training. *Hunter*, MSPB Docket No. DC-0752-97-0952-I-1 (Initial Decision, Dec. 23, 1997). The appellants were, therefore, reinstated to their positions on February 17, 1998 with a retroactive restoration date of August 8, 1997, the date of their initial removals. *Id.* Once the appellants were reinstated to their positions, they were immediately required to requalify with a handgun. CIAF, Tab 5, Subtab 1; HIAF, Tab 5, Subtab 1.

¶7 When an agency is ordered to cancel an adverse action, the employee must be restored to the status quo ante. The status quo ante is not mere reinstatement to the former position. Placing an appellant in the status quo ante means

"*restoration of the situation*, as nearly as possible, to that which would have obtained but for" the wrongful personnel action. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984), quoting *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177 (1941) (emphasis added). In this case, the status quo ante is entitlement to the training the appellants were due under the agency's regulations at the time of their first removals, i.e., quarterly familiarization and remedial training. It is unclear from the record whether the agency provided this training to the appellants because the administrative judge did not allow evidence as to the adequacy of the training due to his erroneous determination that the nature of the training provided to the appellants was irrelevant. Had there been no previous status quo ante order from us, the sufficiency of the training would, indeed, have been irrelevant; however, this appeal is best handled as a compliance matter regarding the first reinstatement order that goes immediately and fundamentally to the validity of the second removals. Therefore, we are remanding these appeals for development of the record regarding the agency's compliance with the Board's previous status quo ante order.

ORDER

¶8 We VACATE the initial decision and REMAND these appeals to the Washington Regional Office for adjudication of the agency's compliance with the Board's final orders in *Hunter v. Department of the Navy*, MSPB Docket No. DC-0752-97-0952-I-1 and *Cloude v. Department of the Navy*, MSPB Docket No.

DC-0752-97-094-I-1. If the administrative judge finds that the agency did not comply, then the appellants' second removals must be reversed.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.